In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

PATSY T. MINK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Relevant Docket Entries

No. 1614-71 in the United States District Court for the District of Columbia

Date	Proceedings
1971	
August 11	Complaint, appearance; Exhibits (2)
August 12	Complaint reflecting address of plts.; c/m 8-12-71. filed
August 20	Motion of Pltfs for preliminary injunction; and motion for summary judgment; statement; affidavit; exhibits # 3 & 4; P & A; in support of motions for summary judgment and preliminary injunction; c/m 8-20-71; M.C. filed
August 23	Motion of defts to dismiss or in the alternative for summary judgment; P & A's; statement; affidavit; exhibit A, b, c, d & e; c/m 8-23-71. filed
August 23	Opposition of defts. to plts' motion for preliminary injunction; c/m 8-23-71, Memo in support, Statement of facts. filed
August 23	Opposition of defts to plts' motion for summary judgment; c/m 8-23-71. filed
August 25	Supplemental memorandum of P & A's in support of pltf's motion for Preliminary Injunction, Summary Judgment and Emergency Consideration thereof, and in opposition to defts' Cross-motion to dismiss or for Summary Judgment; Exhibits # 5 & 6; affidavits (4); c/m 8-25-71. filed
August 27	Order granting motion of defts. to dismiss; granting motion of defts for summary judgment; denying motion of pltfs for summary

Date	Proceedings
	judgment; denying motion of pltfs. for preliminary injunction as moot; and dismissing cause. (N) Hart, J.
August 30	Notice of appeal by pltfs. from order of 8-27-71; copy mailed to Jeffrey Axelrod; $5.00 deposit by Clark. filed
August 31	Affidavit of pltf's in support of motion for summary judgment and/or preliminary injunction. Exhibit 3 filed

No. 71-1708 in United States Court of Appeals for the District of Columbia Circuit

1971	
September 3	4-Appellant's motion for summary reversal in camera examination, expedited consideration, and oral argument (p-2)
September 10	4-Appellee's objection to motion for summary reversal and for further relief (m-10)
October 15	Per Curiam order reversing judgment of the District Court and remanding case to the District Court for further consideration in accordance with opinion. SCJ Fahy, Leventhal and Wilkey, CJs. CJ Wilkey did not participate
October 15	Opinion and certified copy of order reversing and remanding issued to the District Court forthwith
November 2	Per Curiam order sua sponte, amending opinion filed October 15th. Fahy, Sr. CJ and Leventhal and Wilkey, CJ

No. 71-909 in the United States Supreme Court

1972	
January 13	Petition for a writ of certiorari filed
February 14	Brief for the respondents in opposition filed
March 6	Order granting petition for a writ of certiorari

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C. A. No. 1614-71

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

[Filed August 12, 1971]

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DEPARTMENT OF STATE
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Washington, D. C. 20520

WILLIAM P. ROGERS
Secretary of State
Department of State
Washington, D. C. 20520

JOHN N. IRWIN, II
Undersecretary of State
Department of State
Washington, D. C. 20520,

DEFENDANTS.

1. This is an action under 5 U.S.C. § 552, the Freedom of Information Act, for an order requiring the production of certain records in the custody of the defendants and enjoining the defendants from continuing to withhold the said records as requested by plaintiffs.

2. The court has jurisdiction of the action under 5 U.S.C. § 552(a)(3).

3. The agency records sought to be produced are located within the District of Columbia at the offices of the defendants Environmental Protection Agency, Council on Environmental Quality, Office of Science and Technology, and Department of State.

4. Plaintiffs are duly elected and sworn members of the House of Representatives of the Ninety-Second Congress of the United States. Plaintiffs are persons within the meaning of 5 U.S.C. § 551.

5. The defendants Environmental Protection Agency, Council on Environmental Quality, Office of Science and Technology, and Department of State are agencies within the meaning of 5 U.S.C. § 551.

6. On information and belief, defendant Irwin, acting under the authority of defendant Rogers, served as chairman of and otherwise directed a certain inter-departmental committee that prepared a study, report, or other statement, concerning a proposed underground nuclear test at Amchitka Island known as "Cannikin."

7. On information and belief, the defendant Environmental Protection Agency (acting under the authority of its Administrator, defendant Ruckelshaus), defendant Council on Environmental Quality (acting under the authority of its Chairman, defendant Train) and defendant Office of Science and Technology (acting under the authority of its Director, defendant David) prepared critiques, recommendations, reports, or other submissions with respect to the study, report, or other statement prepared by the inter-departmental committee chaired by the said Irwin.

8. On July 28, 1971, plaintiff Mink, in her capacity as a member of the House of Representatives, sent a telegram to the President of the United States. The text of the telegram, a copy of which is annexed to this complaint as Exhibit 1, was as follows:

> "Urgently request that Administration honor its many promises and obey law by providing Congress with vitally needed information so it can properly legislate. Need immediate release of recommendations and report by inter-departmental committee urging cancella-

tion or postponement of underground nuclear test on Amchitka Island. Administration currently in violation of Freedom of Information Act by claiming material is classified as basis for refusal. Believe strongly that Congress entitled to know why the Environmental Protection Agency and Council of Environmental Quality opposed test. Continued secrecy on this aspect only helps to intensify public distrust of government."

9. On or about July 30, 1971, John W. Dean, III, counsel to the President, responded to plaintiff Mink's telegram by letter, a copy of which is annexed to this complaint as Exhibit 2. The text of Mr. Dean's letter was as follows:

"This is to thank you and reply to the request which you made on July 28 for the release of agency recommendations on the proposed underground nuclear test at Amchitka Island in Alaska.

"These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy. Therefore, I regret to inform you that they are not available for release.

"We appreciate your interest in this matter."

10. Plaintiffs have exhausted their administrative remedies. Plaintiffs have complied with all applicable regulations.

11. The records requested by plaintiffs are subject to disclosure under the Freedom of Information Act and are not exempted from disclosure to plaintiffs under the Freedom of Information Act or any other applicable statute.

WHEREFORE, plaintiffs pray that this Court:

12. Issue an injunction against the defendants, their agents, servants, and employees, permanently enjoining them from further withholding the records requested;

13. Order the immediate production and inspection for copying by plaintiffs of the following records, relating to the proposed underground nuclear test at Amchitka Island known as "Cannikin";

(a) Any and all studies, reports, or other statements

by a certain inter-departmental committee, whether chaired or otherwise directed by defendant Irwin, otherwise under the authority of defendants Department of State and Rogers, or otherwise constituted or authorized;

(b) Any and all critiques, recommendations, reports or other submissions in connection with the records referred to in Paragraph 13(a) of the following defendants, and each of them:

(i) Environmental Protection Agency and/or Ruckelshaus;
(ii) Council on Environmental Quality and/or Train;
(iii) Office of Science and Technology and/or David.

/s/ Ramsey Clark
RAMSEY CLARK

A Member of the Firm of
Paul, Weiss, Rifkind, Wharton
& Garrison
1775 K Street, N.W.
Washington, D. C. 20006
(202) 293-6370

Dated: August 12, 1971
Washington, D. C.

Of Counsel:
Kenneth C. Bass, III
Leonard H. Becker

WESTERN UNION TELEGRAM

NO. WDS.—CL. OF SVC. PD. OR COLL. CASH NO.

Official

CHARGE TO THE ACCOUNT OF
REP. PATSY T. MINK

☐ OVER NIGHT TELEGRAM
UNLESS BOX ABOVE IS CHECKED THIS
MESSAGE WILL BE SENT AS A TELEGRAM

Send the following message, subject to the terms on back hereof, which are hereby agreed to July 28, 1971

TO ☐ The Honorable Richard M. Nixon

STREET & NO. President CARE OF
United States of America OR APT. NO.

CITY & STATE 1600 Pennsylvania Avenue, N.W. TELEPHONE
Washington, D.C. ZIP CODE 20500

Urgently request that Administration honor its many promises and obey law by providing Congress with vitally needed information so it can properly legislate. Need immediate release of recommendations and report by interdepartmental committee urging cancellation or postponement of underground nuclear test on Amchitka Island. Administration currently in violation of Freedom of Information Act by claiming material is classified as basis for refusal. Believe strongly that Congress entitled to know why the Environmental Protection Agency and Council of Environmental Quality opposed test. Continued secrecy on this aspect only helps to intensify public distrust of government.

PATSY T. MINK
Member of Congress

SENDER'S TEL. NO. 54906 NAME & ADDRESS Representative
Patsy T. Mink
301 Cannon
HOB

WU 1207 (R 5-69)

EXHIBIT 1

THE WHITE HOUSE

WASHINGTON

July 30, 1971

Aug. 2, 1971

Dear Mrs. Mink:

This is to thank you and reply to the request which you made on July 28 for the release of agency recommendations on the proposed underground nuclear test at Amchitka Island in Alaska.

These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy. Therefore, I regret to inform you that they are not available for release.

We appreciate your interest in this matter.

Sincerely,

/s/ John W. Dean
JOHN W. DEAN, III
Counsel to the President

Honorable Patsy T. Mink
House of Representatives
Washington, D.C. 20515

EXHIBIT 2

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION AND FOR EMERGENCY CONSIDERATION THEREOF

[Filed August 20, 1971]

Upon the Amended Complaint herein, the accompanying affidavit of Congresswoman Patsy T. Mink and supporting memorandum of points and authorities, and pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs hereby move for an order preliminarily directing defendants to produce immediately for inspection and copying by plaintiffs the records described in Paragraph 13 of the Complaint and Amended Complaint, and for emergency consideration of the said motion.

The grounds for this motion, and for the application for emergency consideration, are:

1. Plaintiffs are Members of Congress who need the aforesaid information in order to perform the duties of their offices;

2. If the information is not made available to plaintiffs prior to the scheduled October detonation of a 5-megaton nuclear warhead at Amchitka Island, Alaska, plaintiffs' ability to exercise their constitutional duties will be irreparably injured;

3. Plaintiffs as Members of Congress are entitled as a matter of law to have access to these documents.

Respectfully submitted,

/s/ Ramsey Clark

RAMSEY CLARK
A Member of the Firm of
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1775 K Street, N. W.
Washington, D. C. 20006
(202) 293-6370

Dated:
August 20, 1971
Washington, D. C.

Of Counsel:
Kenneth C. Bass, III
Leonard H. Becker

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT AND FOR EMERGENCY CONSIDERATION THEREOF

[Filed August 20, 1971]

Upon the Amended Complaint herein, the statement of material facts as to which there is no genuine issue, affidavit of Congresswoman Patsy T. Mink, and supporting memorandum of points and authorities, and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(h) of the Rules of the United States District Court for the District of Columbia, plaintiffs hereby move for summary judgment and for emergency consideration of the said motion.

The grounds for the motion, and for the application for emergency consideration, are set forth in the affidavit and memorandum referred to above.

Respectfully submitted,
/s/ Ramsey Clark
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(202) 293-6370

Dated:
August 20, 1971
Washington, D.C.

Of Counsel:
Kenneth C. Bass, III
Leonard H. Becker

[Title Omitted in Printing]

Statement of Material Facts as to Which There Is No Genuine Issue

[Filed August 20, 1971]

1. Each of the thirty-three plaintiffs in this action is a duly elected and confirmed member of Congress presently serving in the United States House of Representatives.

2. Defendant John N. Irwin, II, acting under the authority of defendant William P. Rogers, served as chairman of and otherwise directed a certain inter-departmental committee within the Executive branch of the United States Government that prepared a study, report or other statement concerning a proposed underground nuclear test at Amchitka Island known as "Cannikin."

3. Defendants Environmental Protection Agency (acting under the authority of its Administrator, defendant Ruckelshaus), Council on Environmental Quality (acting under the authority of its Chairman, defendant Train), and Office of Science and Technology (acting under the authority of its Director, defendant David) prepared critiques, recommendations, reports or other submissions with respect to said study, report or other statement prepared by the inter-departmental committee chaired by defendant Irwin.

4. Said study, reports, statements, critiques, recommendations and submissions are located within the District of Columbia at the offices of defendants Environmental Protection Agency, Council on Environmental Quality, Office of Science and Technology and Department of State.

5. On July 28, 1971, plaintiff Mink, in her capacity as a member of the House of Representatives, sent a telegram to the President of the United States. The text of the telegram, a copy of which is annexed to the complaint as Exhibit 1, was as follows:

"Urgently request that Administration honor its many

promises and obey law by providing Congress with vitally needed information so it can properly legislate. Need immediate release of recommendations and report by inter-departmental committee urging cancellation or postponement of underground nuclear test on Amchitka Island. Administration currently in violation of Freedom of Information Act by claiming material is classified as basis for refusal. Believe strongly that Congress entitled to know why the Environmental Protection Agency and Council on Environmental Quality opposed test. Continued secrecy on this aspect only helps to intensify public distrust of government."

6. On or about July 30, 1971, John W. Dean, III, Counsel to the President, responded to plaintiff Mink's telegram by letter, a copy of which is annexed to the complaint as Exhibit 2. The text of Mr. Dean's letter was as follows:

"This is to thank you and reply to the request which you made on July 28 for the release of agency recommendations on the proposed underground nuclear test at Amchitka Island in Alaska.

"These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy. Therefore, I regret to inform you that they are not available for release.

"We appreciate your interest in this matter."

7. Plaintiffs have exhausted their administrative remedies. Plaintiffs have complied with all applicable regulations.

8. The plaintiffs in this action believe that they must have access to copies of the above mentioned study, critiques, recommendations, reports, and other submissions in order to perform their duties as members of the House of Representatives in accordance with the Constitution of the United States.

9. Plaintiffs are entitled to disclosure of the materials they seek under the Freedom of Information Act.

/s/ Ramsey Clark
RAMSEY CLARK
Attorney for Plaintiffs
A Member of the Firm of Paul, Weiss, Rifkind, Wharton & Garrison
1775 K Street, N. W.
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(202) 293-6370

Dated:
August 20, 1971
Washington, D. C.

Of Counsel:
Kenneth C. Bass, III
Leonard H. Becker

[Title Omitted in Printing]

AFFIDAVIT IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND/OR PRELIMINARY INJUNCTION

[Filed August 20, 1971; executed copy filed August 31, 1971]

} ss.:

PATSY T. MINK, being duly sworn, deposes and says:

1. I am the duly elected and qualified Member of Congress representing the second Congressional district of the State of Hawaii. I have served in the United States Congress continuously since January 3, 1965.

2. I make this affidavit in support of plaintiffs' motions for summary judgment and/or preliminary injunction in the above-captioned action.

3. The Atomic Energy Commission ("AEC") intends to detonate a 5-megaton nuclear warhead on Amchitka Island, Alaska, sometime during the first week in October 1971. The scheduled test detonation (code-named "Cannikin") is the latest in a series of underground nuclear explosions conducted by the AEC on Amchitka Island.

4. Amchitka Island is located in the Aleutian Island chain, an area of frequent and intense seismic activity that has been the site of several severe earthquakes. In 1946 an Aleutian earthquake triggered a tidal wave that rolled across the Pacific and killed 173 persons in Hawaii while destroying $25 million worth of property. Again in 1957 a similar earthquake caused $3 million worth of damage in Hawaii. And in 1964 another Alaska earthquake initiated a tidal wave that killed 12 persons in Crescent City, California.

5. Scientific evidence indicates that a large nuclear explosion on Amchitka Island could induce—either immediately or after a period of time—a severe earthquake that could cause damage well beyond the area of the test site.

6. The people of Hawaii are understandably concerned about the possible harmful effects of Cannikin. Many of

my constitutents [sic] have written to me to express their concern.

7. On July 15, 1971, the House of Representatives considered H. R. 9388, the Atomic Energy Commission authorization bill for fiscal 1972. At that time I introduced an amendment to the bill to eliminate funds authorized for Cannikin. During the course of the debate on that amendment, other members and I attempted to persuade our colleagues that the dangers involved clearly outweighed the benefits. My colleague, the Honorable Abner Mikva of Illinois, discussed possible adverse environmental effects that could result from the detonation. In reply, the Honorable John Anderson of Illinois stated that Mr. Mikva "has not presented us with a scintilla of evidence of how the adverse consequences of which he complains might occur. When the question involves the security of our Nation, then I think it is incumbent upon the gentleman to come forward with more than mere conjecture or hypothesis as to what might or could occur." (Congressional Record for July 15, 1971 at H 6787). The debates continued with those of us opposed to the test relying on what little information we had at hand. We were unable to persuade a majority of the House to agree with us, and the amendment was defeated. I believe a significant contributing factor to our inability to pass the amendment was the limited amount of scientific and other information we were able to present to the House in support of our arguments.

8. On July 20, 1971, the United States Senate considered H. R. 9388. During that consideration several Senators, including Senators Gravel and Stevens of Alaska, attempted to eliminate funds for the Amchitka test. Once again opponents of the test were hampered by limited information. The floor manager for the bill, Senator Pastore of Rhode Island, himself effectively conceded that neither he nor any other member of the Senate had sufficient factual information to question the conclusions and recommendations of the Executive Branch in this matter. (Congressional Record for July 20, 1971 at S 11510).

9. On July 26, 1971 an article was published in *The Evening Star* (a Washington, D. C., newspaper) indicating

that certain Federal agencies had recommended to The White House that Cannikin be cancelled. That article was the first indication I had that the Executive Branch possessed information not available to members of Congress. A copy of that article is attached hereto as Exhibit 3.

10. Since the House of Representatives was scheduled to consider the AEC appropriations bill, H. R. 10090, during the week of July 26, 1971, I tried to obtain the reports discussed in the *Star* article from The White House.

11. On July 28, 1971 I telegraphed the President of the United States, requesting the release of those recommendations since they apparently contained "vitally needed information" that the Congress had to have to properly carry out its constitutional function of making law. A copy of that telegram is attached as Exhibit 1 to the Complaint filed in this action.

12. On July 29, 1971 H.R. 10090 was considered on the floor of the House. At that time I offered an amendment prohibiting the use of any funds appropriated by that bill to finance Cannikin. I brought the *Star* article to the attention of the House and reported on my inability to obtain copies of the reports discussed in that article. In urging passage of the amendment, I told my colleagues:

> "The safety of the people of my State is involved. The safety and hazard to our environment are involved. The risks have been cited by some of our country's most eminent scientists. And now we are told these risks have been concurred in by our two Government agencies mandated by law to protect and safeguard our environment, and yet we are not able to even read these reports." (Congressional Record of July 29, 1971 at H 7409).

Again, those of us who opposed the test were unable to persuade a majority of our colleagues to join us, and the amendment was defeated by a vote of 275 to 108.

13. On July 31, 1971 the United States Senate considered H.R. 10090. Efforts were again made in that body to restrict the use of funds for Cannikin. Ultimately a compromise amendment was accepted by the Senate. The amend-

ment prohibits use of funds appropriated by the bill to finance the scheduled Amchitka test "unless the President gives his direct approval for such test." (Congressional Record of July 31, 1971 at S 2710). As passed by the Senate, H.R. 10090 contains that restriction.

14. H.R. 10090 as passed by the Senate contains amendments not present in the version passed by the House. The Senate has requested a conference with the House to resolve the differences between the two bills. (Congressional Record of July 31, 1971 at S 12738). Prior to the Congressional recess beginning August 6, 1971 the House of Representatives had not agreed to the conference requested by the Senate.

15. Some time after the Congress returns from its recess on September 8, 1971, the House of Representatives will consider the Senate's request for a conference. The House could decide to accept the Senate's version of H. R. 10090 and avoid the necessity of a conference. The House could also decide, however, to agree to the requested conference. At that time a motion to instruct the House conferees to accept the Amchitka test restriction could be offered. When and if the conference committee submits its report to the House, members may have another opportunity to vote on the Amchitka question. Thus the House of Representatives will have at least two additional occasions to exercise its constitutional prerogative on this issue.

16. The information contained in the recommendations to the President would be highly useful to individual members of Congress and the members of the conference committee in deciding whether to enact the Senate-passed restriction or some modification thereof.

17. The information contained in those recommendations would also be useful to members of Congress in considering the desirability of additional legislation or other Congressional action in this matter.

18. On August 2, 1971 I received a letter from John W. Dean, III, Counsel to the President, informing me that the reports described in the *Star* article were not available to members of Congress. A copy of that letter is attached as Exhibit 2 to the complaint filed herein.

19. I believe that the information contained in the recommendations to the President is essential to the proper conduct of my duties as the Representative of the people of the second Congressional district of Hawaii. I further believe that the satisfactory performance of my constitutional duties will be seriously impaired if I am unable to obtain those reports and recommendations.

20. The refusal of the Executive Branch to provide the information to a co-equal branch of the United States Government graphically illustrates the difficulties Congress faces in carrying out its legislative responsibilities. My colleagues who have joined in this action and I believe that proper conduct of the affairs of Government requires free and ready access by the Congress to any and all documents or information needed to enable us to act intelligently and to form our own independent judgments on questions of governmental policy. Our present and past inability to obtain information from the Executive Branch has been a major contributing factor in impairing the ability of the Congress to perform its duties. We who were in Congress when the Freedom of Information Act was passed believed that it would ameliorate the problems of access to official information. We bring this action to confirm and validate that belief.

/s/

PATSY T. MINK

Sworn to before me this —— day of August, 1971.

B-10 THE EVENING STAR
Washington, D. C., Monday, July 26, 1971

AGENCIES' VIEWS DIFFER ON AMCHITKA TEST BLAST

By James Welsh, *Star Staff Writer*

The White House has received conflicting recommendations from various government agencies on whether to go ahead this fall with an underground nuclear test on remote Amchitka Island.

According to informed sources, two federal agencies, the Department of Defense and the Atomic Energy Commission, favor a go-ahead for the five-megaton test blast.

For a variety of reasons, five other agencies—the State Department, the Office of Science and Technology, the United States Information Agency, the Environmental Protection Agency and the Council of Environmental Quality have recommended either cancelling the test or postponing it until after the SALT arms-limitations talks.

Amchitka is at the southwestern tip of the Aleutian Islands off Alaska, about 700 miles from the Soviet Union.

In October, 1969, the AEC set off a one-megaton hydrogen bomb 4,000 feet deep within the islands without causing any of the earthquakes, tidal waves or environmental damage feared by critics of the testing.

The megatonnage of this fall's planned test, which is code-named Cannikin, is five times as large. The nuclear device is scheduled to explode 6,000 feet underground. Cannikin is a test of a large Spartan warhead designated for use as a component of an ABM system protecting Minuteman missile sites.

The latest recommendations on the proposed test are a product of a departmental under-secretary committee named to investigate the controversy. The recommendations went directly to Henry Kissinger, Nixon's chief foreign policy adviser, and John Ehrlichman, chief domestic adviser.

The Defense Department and AEC, sources said yester-

day, continue to favor the testing as important to national security. They minimize the chances that the test will trigger earthquakes or cause other unwanted environmental side effects.

OST, which is the President's scientific advisory arm, reportedly opposes the experiment, not primarily for environmental reasons but because the warhead to be tested has been made obsolete by recent weapons development.

The State Department, sources said, took a middle ground. It did not recommend cancelling the test, but advised postponing it until the completion of the SALT talks. The Council of Environmental Quality took much the same position. The Environmental Protection Agency opposes the test, believing that even a slight possibility of earthquake is too much of a chance to take.

[Title Omitted in Printing]

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

[Filed August 23, 1971]

Defendants, by their undersigned attorneys, pursuant to Rules 12(b)(1), (6) and 56 of the Federal Rules of Civil Procedure, hereby move to dismiss the action on the grounds that the Court lacks jurisdiction over the subject matter of the action and the complaint fails to state a claim upon which relief can be granted or, in the alternative, for summary judgment on the ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

In support of this motion, the Court is respectfully referred to the affidavit of John N. Irwin II, attached hereto, and to Defendants' Statement of Material Facts as to Which There is No Genuine Issue and Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed herewith.

Respectfully submitted,

/s/ L. Patrick Gray, III
L. PATRICK GRAY, III
Assistant Attorney General

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

/s/ Harland F. Leathers
HARLAND F. LEATHERS
/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Attorneys, Department of Justice
Attorneys for Defendants

[Title Omitted in Printing]

AFFIDAVIT OF JOHN N. IRWIN II

[Filed August 23, 1971]

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

I, John N. Irwin II, being duly sworn, do depose and state as follows:

1. I am the Under Secretary of State of the Department of State. The facts stated in this affidavit have come to my knowledge in my official capacity.

2. President Richard M. Nixon established on January 20, 1969, a Committee of which the Under Secretary of the Department of State was appointed Chairman by virtue of his position. This Committee is known as the Under Secretaries Committee and is a constituent part of the National Security Council system. This system was shaped in its present form by the President so that he could use it as an instrument for obtaining advice on important questions relating to our national security. Excerpts from a report to the Congress by the President, dated February 18, 1970, describing the National Security Council system are attached hereto as Exhibit A. By a further report to the Congress dated February 25, 1971, excerpts of which are attached as Exhibit B, the President informed Congress that the Under Secretaries Committee, of which I am currently Chairman, "links the process of policy formulation to the operations of the Government."

3. On June 27, 1969, the President directed the Under Secretaries Committee to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests. He directed that the Committee consider the policy and technical justification for the proposed tests to determine whether they are consistent with the requirements of national security and foreign policy. He requested that the

results of the Committee's review of the underground nuclear tests programs and its recommendations be transmitted to him in time to allow him to give them full consideration before the scheduled events.

4. On August 12, 1970, the Under Secretaries Committee sent its review of the fiscal year 1971 underground test program to the President and pointed out that it would begin early consideration of the proposed Cannikin underground test proposed for the 1972 fiscal year.

5. In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:

A. A memorandum prepared by me to the President dated July 17, 1971. This memorandum is classified as Top Secret and as Restricted Data.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin, dated June 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data; and

5. A memorandum to me from the Council on En-

vironmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.

6. The documents described in the preceding paragraph as Top Secret and Secret are and have been classified pursuant to Executive Order No. 10501, and the documents described as Restricted Data are and have been classified pursuant to the Atomic Energy Act of 1954, as amended. (42 USC 2014(Y), 2161 and 2162). The classified documents so described make use of data which have been identified by the Atomic Energy Commission as Restricted Data and of data classified by other agencies as Top Secret and Secret. Only persons with a "Q" clearance, or a comparable Department of Defense clearance, may have access to information which is Restricted Data. Attached as Exhibit D is an Atomic Energy Commission pamphlet which applies to State Department employees and others and details the handling of Restricted Data. I am advised that the Atomic Energy Commission is reviewing the relevant documents to determine whether or not the Restricted Data classification can now be removed.

7. As Chairman of the Under Secretaries Committee, I sought to make publicly available as much information as possible consistent with the needs of national defense and foreign policy. For instance, by letter dated January 8, 1971, attached as Exhibit E, I sought to have certain information declassified. The Defense Department subsequently agreed and the information referred to in my January 8, 1970 letter has been made public. The information in the documents described in this affadivit which is not public necessarily is held in strict confidence by the Government in order to prevent grave damage to our national defense and foreign policy interests.

/s/ John N. Irwin II
JOHN N. IRWIN II

Subscribed and sworn to before me this 19th day of August, 1971, in the City of Washington, District of Columbia.

/s/ Marcelle A. Ward
My Commission Expires Oct. 31, 1971

U.S. FOREIGN POLICY

FOR THE 1970's

A NEW STRATEGY FOR PEACE

[Seal]

A Report To The Congress

By

RICHARD NIXON

President of the United States

February 18, 1970

EXHIBIT A

[Table of Contents Omitted in Printing]

[pages 17-23]

The National Security Council System

If we were to establish a new foreign policy for the era to come, we had to begin with a basic restructuring of the process by which policy is made.

Our fresh purposes demanded new methods of planning and a more rigorous and systematic process of policymaking. We required a system which would summon and gather the best ideas, the best analyses and the best information available to the government and the nation.

Efficient procedure does not insure wisdom in the substance of policy. But given the complexity of contemporary choices, adequate procedures are an indispensable component of the act of judgment. I have long believed that the most pressing issues are not necessarily the most fundamental ones; we know that an effective American policy requires clarity of purpose for the future as well as a procedure for dealing with the present. We do not want to exhaust ourselves managing crises; our basic goal is to shape the future.

At the outset, therefore, I directed that the National Security Council be reestablished as the principal forum for Presidential consideration of foreign policy issues. The revitalized Council—composed by statute of the President, the Vice President, the Secretaries of State and Defense, and the Director of the Office of Emergency Preparedness—and its new system of supporting groups are designed to respond to the requirements of leadership in the 1970's:

—Our policy must be creative: foreign policy must mean more than reacting to emergencies; we must fashion a new and positive vision of a peaceful world, and design new policies to achieve it.

—Our policymaking must be systematic: our actions must be the products of thorough analysis, forward planning, and deliberate decision. We must master problems before they master us.

—We must know the facts: intelligent discussions in

the National Security Council and wise decisions require the most reliable information available. Disputes in the government have been caused too often by an incomplete awareness or understanding of the facts.

—We must know the alternatives: we must know what our real options are and not simply what compromise has found bureaucratic acceptance. Every view and every alternative must have a fair hearing. Presidential leadership is not the same as ratifying bureaucratic consensus.

—We must be prepared if crises occur: we must anticipate crises where possible. If they cannot be prevented, we must plan for dealing with them. All the elements of emergency action, political as well as military, must be related to each other.

—Finally, we must have effective implementation: it does little good to plan intelligently and imaginatively if our decisions are not well carried out.

Creativity: Above all, a foreign policy for the 1970's demands imaginative thought. In a world of onrushing change, we can no longer rest content with familiar ideas or assume that the future will be a projection of the present. If we are to meet both the peril and the opportunity of change, we require a clear and positive vision of the world we seek—and of America's contribution to bringing it about.

As modern bureaucracy has grown, the understanding of change and the formulation of new purposes have become more difficult. Like men, governments find old ways hard to change and new paths difficult to discover.

The mandate I have given to the National Security Council system, and the overriding objective of every policy review undertaken, is to clarify our view of where we want to be in the next three to five years. Only then can we ask, and answer, the question of how to proceed.

In central areas of policy, we have arranged our procedure of policymaking so as to address the broader questions of long-term objectives first; we define our purposes, and

then address the specific operational issues. In this manner, for example, the NSC first addressed the basic questions of the rationale and doctrine of our strategic posture, and then considered—in the light of new criteria of strategic sufficiency—our specific weapons programs and our specific policy for the negotiations on strategic arms limitation. We determined that our relationship with Japan for the 1970's and beyond had to be founded on our mutual and increasingly collaborative concern for peace and security in the Far East; we then addressed the issue of Okinawa's status in the light of this fundamental objective.

Systematic Planning: American foreign policy must not be merely the result of a series of piecemeal tactical decisions forced by the pressures of events. If our policy is to embody a coherent vision of the world and a rational conception of America's interests, our specific actions must be the products of rational and deliberate choice. We need a system which forces consideration of problems before they become emergencies, which enables us to make our basic determinations of purpose before being pressed by events, and to mesh policies.

The National Security Council itself met 37 times in 1969, and considered over a score of different major problems of national security. Each Council meeting was the culmination of an interagency process of systematic and comprehensive review.

This is how the process works: I assign an issue to an Interdepartmental Group—chaired by an Assistant Secretary of State—for intensive study, asking it to formulate the policy choices and to analyze the pros and cons of the different courses of action. This group's report is examined by an interagency Review Group of senior officials—chaired by the Assistant to the President for National Security Affairs—to insure that the issues, options, and views are presented fully and fairly. The paper is then presented to me and the full National Security Council.

Some topics requiring specialized knowledge are handled through different channels before reaching the National Security Council. But the purpose is the same—systematic

review and analysis, bringing together all the agencies concerned.

—The major issues of defense policy are treated in systematic and integrated fashion by the NSC Defense Program Review Committee. This group reviews at the Under Secretary level the major defense policy and program issues which have strategic, political, diplomatic, and economic implications in relation to overall national priorities.

—Through other NSC interagency groups, the United States Government has undertaken its first substantial effort to review all its resource programs within certain countries on a systematic and integrated basis, instead of haphazardly and piecemeal.

Determination of the Facts: Intelligent discussions and decisions at the highest level demand the fullest possible information. Too often in the past, the process of policy-making has been impaired or distorted by incomplete information and by disputes in the government which resulted from the lack of a common appreciation of the facts. It is an essential function of the NSC system, therefore, to bring together all the agencies of the government concerned with foreign affairs to elicit, assess, and present to me and the Council all the pertinent knowledge available.

Normally, NSC Interdepartmental Groups are assigned this task. But other interagency groups perform this function for certain special topics. For example:

—The Verification Panel was formed to gather the essential facts relating to a number of important issues of strategic arms limitation, such as Soviet strategic capabilities, and our potential means of verifying compliance with various possible agreements. This Panel was designed not to induce agreement on policy views, but to establish as firmly as possible the data on which to base policy discussions. It helped to resolve many major policy differences which might otherwise have been intractable. As the section on Arms Control in this report

explains in detail, the Panel played a central part in making our preparation for the Strategic Arms Limitation Talks with the Soviet Union the most thorough in which the U.S. Government has ever engaged.

—The Vietnam Special Studies Group (VSSG) gathers and presents to the highest levels of the United States Government the fullest and most up-to-date information on trends and conditions in the countryside in Vietnam. This group is of key assistance in our major and sustained effort to understand the factors which will determine the course of Vietnamization.

Full Range of Options: I do not believe that Presidential leadership consists merely in ratifying a consensus reached among departments and agencies. The President bears the Constitutional responsibility of making the judgments and decisions that form our policy.

The new NSC system is designed to make certain that clear policy choices reach the top, so that the various positions can be fully debated in the meeting of the Council. Differences of view are identified and defended, rather than muted or buried. I refuse to be confronted with a bureaucratic consensus that leaves me no options but acceptance or rejection, and that gives me no way of knowing what alternatives exist.

The NSC system also insures that all agencies and departments receive a fair hearing before I make my decisions. All Departments concerned with a problem participate on the groups that draft and review the policy papers. They know that their positions and arguments will reach the Council without dilution, along with the other alternatives. Council meetings are not rubber-stamp sessions. And as my decisions are reached they are circulated in writing, so that all departments concerned are fully informed of our policy, and so that implementation can be monitored.

Crisis Planning: Some events in the world over which we have little control may produce crises that we cannot prevent, even though our systematized study forewarns us

of their possibility. But we can be the masters of events when crises occur, to the extent that we are able to prepare ourselves in advance.

For this purpose, we created within the NSC system a special senior panel known as the Washington Special Actions Group (WSAG). This group drafts contingency plans for possible crises, integrating the political and military requirements of crisis action. The action responsibilities of the departments of the Government are planned in detail, and specific responsibilities assigned in an agreed time sequence in advance. While no one can anticipate exactly the timing and course of a possible crisis, the WSAG's planning helps insure that we have asked the right questions in advance, and thought through the implications of various responses.

Policy Implementation: The variety and complexity of foreign policy issues in today's world places an enormous premium on the effective implementation of policy. Just as our policies are shaped and our programs formed through a constant process of interagency discussion and debate within the NSC framework, so the implementation of our major policies needs review and coordination on a continuing basis. This is done by an interdepartmental committee at the Under Secretary level chaired by the Under Secretary of State.

Conclusions

There is no textbook prescription for organizing the machinery of policymaking, and no procedural formula for making wise decisions. The policies of this Administration will be judged on their results, not on how methodically they were made.

The NSC system is meant to help us address the fundamental issues, clarify our basic purposes, examine all alternatives, and plan intelligent actions. It is meant to promote the thoroughness and deliberation which are essential for an effective American foreign policy. It gives us the means to bring to bear the best foresight and insight of which the nation is capable.

U.S. FOREIGN POLICY

FOR THE 1970's

Building For Peace

[Seal]

A Report To The Congress

By

Richard Nixon

President of the United States

February 25, 1971

Exhibit B

[Table of Contents Omitted in Printing]

[pages 226-229]

"The NSC system is meant to help us address the fundamental issues, clarify our basic purposes, examine all alternatives, and plan intelligent actions. It is meant to promote the thoroughness and deliberation which are essential for an effective American foreign policy."

U.S. Foreign Policy For The 1970's
A Report to the Congress
February 18, 1970

Upon my inauguration, I reestablished the National Security Council as the principal forum for consideration of foreign policy issues and created a system of supporting committees to serve it. Chaired by the President and comprising the Vice President, the Secretaries of State and Defense, the Director of the Office of Emergency Preparedness, and others at my invitation, the Council provides a focus at the highest level of our government for full and frank discussions of national security issues. Of course, I also consult the Secretaries of State and Defense and other senior advisors individually to obtain their views on national security issues.

Too often in the past our foreign policy machinery was the captive of events. Day-to-day tactical considerations occupied our time and determined our actions. Policy emerged from a narrow rather than conceptual perspective. The National Security Council system helps us concentrate on purposes and develop policy in the context of our long-range goals.

The Process

Creativity, systematic planning, and thorough analysis are given special emphasis. It is every concerned agency's obligation to contribute information and analysis and to present and argue its position. Only in this way can I be certain that the full range of views and reasonable options has been explored.

The system helps us to bring together all the knowledge available and to bring to bear the best analytical thought of which we are capable:

—Analysis and decision must rest on the broadest possible factual base. There must be a common appreciation of the facts and of their relevance.

—Coherent policy needs a conceptual framework. Where do we want to go in the long run? What are our purposes? Our analysis must bring out all reasonable interpretations of the facts, and treat the facts in the framework of longer-range trends and our objectives.

—I have made sure that my choice is not limited to ratifying or rejecting bureaucratic compromises which submerge differences to accommodate varying interests within the government. I insist that the facts, issues, and conceptual framework for decision be presented together with alternative courses of action, their pros and cons, and costs and consequences.

The Structure

The NSC system is designed to marshal all the resources and expertise of the departments and agencies of the government. The National Security Council is the apex of the system. It is here that the final refinement of studies conducted at lower levels provides a common framework for thorough deliberation. The Council's discussions assist me by illuminating the issues and focusing the range of realistic choice before I make my decision.

The supporting interagency groups of the system do the preparatory work before consideration of major issues by the Council:

—The Interdepartmental Groups, each chaired by an Assistant Secretary of State, are the system's basic sub-groups for policy analysis. They are organized on a geographic or functional basis, and include membership from all appropriate agencies. They do the

basic studies and develop the range of choices. In some instances ad hoc groups, each chaired by a representative of the appropriate agency at the Assistant Secretary level, are established to deal with specific policy issues.

—The Vietnam Special Studies Working Group is a specialized group for assembling and analyzing factual data on the Vietnam countryside, the economic situation, and other factors affecting Vietnamization. It has investigated specific topics which bear on our negotiating efforts, such as the security implications of alternative ceasefire proposals.

—The Verification Panel, a senior group at the Under Secretary level, performs the basic technical analysis to help develop choices and proposals for strategic arms limitation, approaches to mutual and balanced force reductions in Europe, and other major arms control subjects.

—The Defense Program Review Committee, also at the Under Secretary level, deals with the major issues of defense policy, posture, and budgetary support. It integrates our consideration of the strategic, international political, and economic implications of defense programs. And it relates our defense programs and resource requirements to overall national priorities and the federal budget.

We made changes in the NSC system this past year in the light of experience, primarily to provide a higher-level focus and integration below the National Security Council itself. Two principal groups were raised from the Assistant Secretary to the Under Secretary level. Because the responsibilities of officials at the Under Secretary level transcend specific geographic or functional areas, they are able to view issues in broad perspective; they can draw more fully upon the complete resources of their respective agencies to assure that the entire spectrum of arguments and alternatives is exposed.

—The Senior Review Group directs and reviews the

policy studies prepared by the Interdepartmental Groups and Working Groups. It sees to it that these studies present the facts, the issues, the arguments, and the range of choice, before the studies are considered by the President and the National Security Council.

—The Washington Special Actions Group develops options for implementation of decisions during crises. In 1970, the WSAG had to deal with such situations as Cambodia, the Middle East, and Jordan. In each case, it laid the groundwork for reasoned decisions to prevent crises from expanding and threatening our interests and the peace.

The success of any policy depends largely on effective implementation by the responsible departments and agencies. The Under Secretaries Committeee, chaired by the Under Secretary of State, links the process of policy formulation to the operations of the government. Through interagency review and coordination, it helps to insure that decisions are carried out consistently with policy and uniformly throughout the foreign affairs community. It also recommends to me alternative operational steps to implement broad policy decisions; it develops the details, for example, of our positions in certain important negotiations within the guidelines laid down by the National Security Council.

[Title Omitted in Printing]

OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUCTION

[Filed August 23, 1971]

Defendants, by their undersigned attorneys, hereby oppose plaintiffs' Motion for Preliminary Injunction and respectfully request that it be denied.

In support of this Opposition, the Court is respectfully referred to the Affidavit of John N. Irwin II and Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed herewith.

Respectfully submitted,

/s/ L. Patrick Gray, III
L. PATRICK GRAY, III
Assistant Attorney General

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

/s/ Harland F. Leathers
HARLAND F. LEATHERS

/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Attorneys, Department of Justice
Attorneys for Defendants

[Title Omitted in Printing]

OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

[Filed August 23, 1971]

Defendants, by their undersigned attorneys, hereby oppose plaintiffs' Motion for Summary Judgment and respectfully request that it be denied.

Defendants aver that the sole material facts are those set forth in Defendants' Statement of Material Facts as to Which There is No Genuine Issue, filed herewith.

In support of this Opposition, the Court is respectfully referred to the Affidavit of John N. Irwin II and Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed herewith.

Respectfully submitted,

/s/ L. Patrick Gray, III
L. PATRICK GRAY, III
Assistant Attorney General

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

/s/ Harland F. Leathers
HARLAND F. LEATHERS

/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Attorneys, Department of Justice
Attorneys for Defendants

[Title Omitted in Printing]

Defendants' Statement of Material Facts As To Which There Is No Genuine Issue

[Filed August 23, 1971]

1. Each of the plaintiffs seeks to maintain this action solely in his capacity as a member of Congress.

2. President Richard M. Nixon established on January 20, 1969, a Committee of which the Under Secretary of the Department of State was appointed Chairman by virtue of his position. This Committee is known as the Under Secretaries Committee and is a constituent part of the National Security Council system. This system was shaped in its present form by the President so that he could use it as an instrument for obtaining advice on important questions relating to our national security. By a report to the Congress dated February 25, 1971, the President informed Congress that the Under Secretaries Committee, of which Mr. John N. Irwin II is currently Chairman "links the process of policy formulation to the operations of the Government."

3. On June 27, 1969, the President directed the Under Secretaries Committee to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests. He directed that the Committee consider the policy and technical justification for the proposed tests to determine whether they are consistent with the requirements of national security and foreign policy. He requested that the results of the Committee's review of the underground nuclear tests programs and its recommendations be transmitted to him in time to allow him to give them full consideration before the scheduled events.

4. On August 12, 1970, the Under Secretaries Committee sent its review of the fiscal year 1971 underground test program to the President and pointed out that it would

begin early consideration of the proposed Cannikin underground test proposed for the 1972 fiscal year.

5. In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:

A. A memorandum prepared by Mr. John N. Irwin II to the President dated July 17, 1971. This memorandum is classified as Top Secret.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top-Secret. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, Mr. John N. Irwin II. This letter is separately classified Secret;

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret;

3. The Environmental Statement Cannikin, dated June 1971, by the United States Atomic Energy Commission. This document is publicly available;

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret; and

5. A memorandum to the Under Secretary of State from the Council on Environmental Quality. This memorandum is an attachment to the classified report.

C. In addition, letters containing recommendations were transmitted to the Under Secretary of State regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus, for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret.

The documents described in this paragraph, except for

item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.

6. The documents described in the preceding paragraph as Top Secret and Secret are and have been classified pursuant to Executive Order No. 10501.

7. The information plaintiffs seek which is not public necessarily is held in strict confidence by the Government in order to prevent grave damage to our national defense and foreign policy interests.

Respectfully submitted,

/s/ L. Patrick Gray, III
L. Patrick Gray, III
Assistant Attorney General

/s/ Thomas A. Flannery
Thomas A. Flannery
United States Attorney

/s/ Harland F. Leathers
Harland F. Leathers

/s/ Jeffrey Axelrad
Jeffrey Axelrad
Attorneys, Department of Justice
Attorneys for Defendants

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

AFFIDAVIT IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

[Filed August 25, 1971]

STATE OF ALASKA
THIRD JUDICIAL DISTRICT } ss.

NICK BEGICH, being first duly sworn, deposes and says:

1. I am the duly elected and qualified Member of Congress representing the State of Alaska.

2. I make this Affidavit in support of plaintiffs' Motions for Summary Judgment and Preliminary Injunction in the above-captioned action.

3. In my capacity as a Member of Congress, I am concerned with the possible detrimental effects of the proposed underground detonation of a nuclear warhead at Amchitka Island, Alaska, by the Atomic Energy Commission.

4. Many of my constituents have expressed to me their own concern over the possible effects of the detonation on the people and the State of Alaska. I have attempted, as a Member of Congress, to stop the detonation by amendments to the AEC appropriations and authorization bills for fiscal 1972.

5. I understand that certain reports and recommendations concerning the detonation were prepared by a Committee within the Executive Branch chaired by John N. Irwin, II, Undersecretary of State.

6. I believe that the information contained in those reports and recommendations is essential to the proper conduct of my duties as the Representative of the people of the State of Alaska. I further believe that the satisfactory performance of my constitutional duties will be seriously impaired if I am unable to obtain those reports and recommendations.

/s/ Nick Begich
NICK BEGICH

SUBSCRIBED AND SWORN TO before me this 20 day of August, 1971, at Anchorage, Alaska.

/s/ June F. Selanoff
Notary Public in and for Alaska
My commission expires: 12-6-72

[Title Omitted in Printing]

AFFIDAVIT

IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND/OR PRELIMINARY INJUNCTION

[Filed August 25, 1971]

COUNTY OF ORANGE }
STATE OF NEW YORK } ss.:

JOHN G. DOW, being duly sworn, deposes and says:

1. I am the duly elected and qualified Member of Congress representing the twenty-seventh Congressional district of the State of New York.

2. In my capacity as a Member of Congress I am concerned about the possible detrimental effects of the proposed underground detonation of a nuclear warhead at Amchitka Island, Alaska.

3. I understand that certain reports and recommendations concerning the detonation were prepared by a committee within the Executive Branch chaired by John N. Irwin, II, Undersecretary of State.

4. I believe that the information contained in those reports and recommendations is essential to the proper conduct of my duties as the Representative of the people of the twenty-seventh Congressional district of the State of New York. I further believe that the satisfactory performance of my constitutional duties will be seriously impaired if I am unable to obtain those reports and recommendations.

/s/ John G. Dow
JOHN G. DOW

Sworn to before me this
23rd day of August, 1971.

/s/ Gerald T. Donald
GERALD T. DONALD
Notary Public, State of New York
Residing in Orange County
Commission Expires March 30, 1972

[Title Omitted in Printing]

AFFIDAVIT

IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND/OR PRELIMINARY INJUNCTION

[Filed August 25, 1971]

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

BENJAMIN S. ROSENTHAL, being duly sworn, deposes and says:

1. I am the duly elected and qualified Member of Congress representing the eighth Congressional district of the State of New York. I have served in the United States Congress continuously since February 20, 1962.

2. In my capacity as a Member of Congress I am concerned about the possible detrimental effects of the proposed underground detonation of a nuclear warhead at Amchitka Island, Alaska.

3. I understand that certain reports and recommendations concerning the detonation were prepared by a committee within the Executive Branch chaired by John N. Irwin, II, Undersecretary of State.

4. I believe that the information contained in those reports and recommendations is essential to the proper conduct of my duties as the Representative of the people of the eighth Congressional district of the State of New York. I further believe that the satisfactory performance of my constitutional duties will be seriously impaired if I am unable to obtain those reports and recommendations.

/s/ Benjamin S. Rosenthal
BENJAMIN S. ROSENTHAL

Sworn to before me this
23rd day of August, 1971.

/s/ Marvin R. Evans
MARVIN R. EVANS
Notary Public, District of Columbia
Commission Expires April 30, 1972

The district court's order of August 27, 1971, dismissing plaintiffs' action is printed at Pet. App. C.

[Title Omitted in Printing]

JOINT NOTICE OF APPEAL

[Filed August 30, 1971]

Please take notice that each of the 33 named plaintiffs in the above-captioned action hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final order of this Court entered August 27, 1971 dismissing plaintiffs' complaint insofar as plaintiffs sued as Members of Congress, granting defendants' motion for summary judgment, denying plaintiff's motions for summary judgment and preliminary injunction, and dismissing the action in its entirety.

/s/ Ramsey Clark
RAMSEY CLARK
Attorney for Plaintiffs
Paul, Weiss, Rifkind,
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1775 K Street, N.W.
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(202) 293-6370

Dated: August 30, 1971
Washington, D. C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PATSY T. MINK, ET AL.,
APPELLANTS,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
APPELLEES.

No. 71-1708

MOTION FOR SUMMARY REVERSAL, IN CAMERA EXAMINATION, EXPEDITED CONSIDERATION, AND ORAL ARGUMENT

[Filed September 3, 1971]

Appellants Patsy T. Mink, et al., hereby move this Court as follows:

(1) For an order summarily reversing the August 27, 1971 order of the District Court granting appellees' motion for summary judgment, denying appellants' motion for summary judgment and preliminary injunction, and dismissing appellants' suit insofar as they sought relief as Members of Congress;

(2) For an *in camera* examination by this Court of the documents sought by appellants;

(3) For an order requiring a response by appellees to this motion by September 8, 1971;

(4) For an expedited consideration of the above motions; and

(5) For an oral argument, if this Court does not consider summary reversal appropriate.

As grounds for the motions, appellants respectfully refer

the court to the memorandum of points and authorities submitted in support of the within-motions.

Respectfully submitted,
RAMSEY CLARK
Attorney for Appellants
A Member of the Firm of
Paul, Weiss, Rifkind, Wharton
& Garrison
1775 K Street, N. W.
Washington, D. C. 20006
(202) 293-6370

Dated: September 3, 1971
Washington, D. C.

Of Counsel:
Kenneth C. Bass III
Peter Westen

[Title Omitted in Printing]

AFFIDAVIT

[Filed September 3, 1971]

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

E. W. KENWORTHY, being duly sworn, deposes and says:

1. I am a newspaper reporter for *The New York Times.*

2. On September 2, 1971, I published an article in *The New York Times* concerning a breakfast meeting between William D. Ruckelshaus, Administrator of the Environmental Protection Agency, and a number of reporters.

3. A true copy of that article is attached hereto and marked as "Exhibit I." The article states:

> In a breakfast meeting with reporters yesterday, Mr. Ruckelshaus was asked whether he thought that his letter needed to be classified. He replied:
>
> "The document I received [from Mr. Irwin for comment] was marked 'top secret.' I was informed my comment should be 'top secret.' There was nothing in my comment that needs to be stamped 'top secret.' "

4. I am one of the reporters who attended that breakfast meeting. I am the reporter who asked Mr. Ruckelshaus whether he thought that his letter needed to be classified. I hereby verify and confirm that the above quoted statement by Mr. Ruckelshaus was made by him in my presence and is accurately quoted in this affidavit and in the newspaper article itself.

/s/ E. W. Kenworthy
E. W. KENWORTHY

Subscribed and sworn to before me
this 2nd day of September, 1971.

Betty Mae Smith
Notary Public
My Commission Expires: Sept. 30, 1973

RUCKELSHAUS SCORES LABEL OF SECRECY ON A-TEST NOTE

By E. W. Kenworthy

Special to The New York Times

Washington, Sept. 1—William D. Ruckelshaus, administrator of the Environmental Protection Agency, says that there is no substantive reason for classifying as top secret his recommendations to a Presidential committee on the underground nuclear test scheduled for early next month on Amchitka Island.

"There was nothing in my comments that needs to be stamped 'top secret,' " he told reporters yesterday.

His comments and recommendations were made in a letter to John N. Irwin 2d, Under Secretary of State, who is chairman of the Under Secretaries Committee. President Nixon, in June, 1969, directed his committee to review the underground test program of the Atomic Energy Commission.

In this capacity, the Irwin committee transmitted to the President last July 17 a top secret memorandum and report on the proposed five-megaton blast to test an antimissile warhead for the Spartan missile, the long-range interceptor in the Safeguard missile defense system.

The shot will be fired in a chamber carved out of solid basalt 6,000 feet below the surface of the Aleutian Island. Already, almost $200-million has been spent on digging two shafts and setting up instruments in the chamber.

Rumors Persist

Attached to the Irwin committee memorandum and report were several other documents, including letters from Mr. Ruckelshaus and Russell E. Train, chairman of the White House Council on Environmental Quality.

There have been persistent rumors in Washington that Mr. Ruckelshaus and Mr. Train recommended the cancellation of the test because of possible environmental damage.

It has been impossible to verify these rumors, however, because the Ruckelshaus and Train letters were classified "top secret" under a security practice known as "classification by association." This requires that any documents that could normally be unclassified become classified when they are attached to classified material.

Since the Irwin memorandum and report dealt with a highly classified weapons system, the Ruckelshaus and Train letters, dealing with possible environmental risks of the blast, also became classified when they were incorporated in "the package" sent to the President.

Ruckelshaus's View

In a breakfast meeting with reporters yesterday, Mr. Ruckelshaus was asked whether he thought that his letter needed to be classified. He replied:

"The document I received [from Mr. Irwin for comment] was marked 'top secret.' I was informed my comment should be 'top secret.' There was nothing in my comment that needs to be stamped 'top secret.' "

Quite apart from the question of classification of his comments to the Under Secretaries Committee, Mr. Ruckelshaus is required by law to comment publicly in writing on the environmental impact of any proposed Federal project. This requirement is contained in the Clean Air Act of 1970.

Mr. Ruckelshaus has not made such public comment. He was not available to answer questions on why he had not done so.

Many environmental groups, several scientists and a fairly large body of Congressmen have urged cancellation of the Amchitka project, expressing fears that the blast—equivalent to five million tons of TNT—might trigger an earthquake in an area of geologic faults, start a seismic tidal wave known as a "tsunami," leak radiation into the air or water and kill otters, sea lions, seals and birds.

However, the Atomic Energy Commission, with the support of many scientists, has insisted that such hazards are remote.

Suit Dismissed

Last Friday, Federal District Court Judge George L. Hart in Washington dismissed a suit brought by 33 members of Congress who sought a court order to force the publication of the Irwin report and the attachments.

It was the contention of the Congressmen that such publication was required by the Freedom of Information Act; that there was reason to believe the withheld documents warned of environmental damage from the blast, and they needed the information in the report to perform their legislative duties.

Judge Hart, however, asserted that "some things have got to be secret." He held that the material sought by the Congressmen rightfully came under the exemption in the Freedom of Information Act of matter relating to the nation's security.

On Monday, Judge Hart ruled for the Government in another suit brought by eight environmental and antinuclear testing organizations. They sought an injunction against the test on the ground that the Atomic Energy Commission had violated the National Environmental Policy Act by submitting to the Council on Environmental Quality an "environmental impact" statement that did not meet the law's requirements.

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OPPOSITION OF APPELLEES TO APPELLANTS' MOTION FOR SUMMARY REVERSAL, IN CAMERA EXAMINATION, EXPEDITED CONSIDERATION, AND ORAL ARGUMENT

[Filed September 10, 1971]

Appellees object to appellants' motion for summary reversal, *in camera* examination, expedited consideration, and oral argument for the following reasons:

1. Appellant's have failed to show that there are present any circumstances justifying taking this particular civil appeal up for special, expedited consideration. There is no urgency in this matter sufficient to warrant such an extraordinary course of action. Appellants rely upon affidavits executed by four Congressmen "stating that they believed they needed" the records appellants seek "for a legislative purpose." (Memorandum in support of appellants' motion for summary reversal, etc., page 5). But such an assertion is surely no adequate reason for treatment of the appeal as an "emergency matter."

2. Moreover, singling this appeal out for preferential or accelerated consideration would seem to us to require a showing of a probability of reversal of the District Court's dismissal of the action. But appellants have not—and indeed cannot—make any such showing. To the contrary, it is clear that the dismissal was entirely correct. Insofar as appellants seek to maintain the action in their capacity as Members of Congress, the action presents non-justiciable questions and may not be maintained under the doctrine of Separation of Powers. In addition, each of the documents appellants seek is explicitly exempted from the disclosure requirements of 5 U.S.C. 552, the Act appellants rely upon, because each is classified secret or higher by Executive Order 10501, as amended, and by 5 U.S.C. 552(b)(5) as internal memoranda not otherwise available.

(a) Appellants assert that they are entitled to sue in their

capacity "as Members of Congress" basing their contention on averments such as "[t]he refusal of the Executive Branch to provide this information to a co-equal branch of the United States Government graphically illustrates the difficulties Congress faces in carrying out its legislative responsibilities." (Represenetative Mink's Affidavit, Par. 20). But the doctrine of separation of the powers of the three branches of our Federal Government is a keystone of our constitutional system, and requires "that the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments." *O'Donoghue* v. *United States,* 289 U.S. 516, 530 (1933). Thus, the manner in which the Executive Branch should cooperate with the Legislative Branch of our Government, or, as in this case, with individual Congressmen, is plainly not a proper subject for judicial scrutiny. This necessarily follows here from the fact that there is "a textually demonstratable constitutional commitment of the issue to a coordinate political department." *Baker* v. *Carr,* 369 U.S. 186, 217 (1962).

(b)(i) Each of the documents appellants seek is classified secret or higher by Executive Order 10501, as amended. (Under Secretary Irwin's Affidavit, Pars. 5, 6). 5 U.S.C. 552(b)(1) authorizes withholding of documents so classified. *Epstein* v. *Resor,* 421 F.2d 930 (9th Cir. 1970) *cert. denied,* 398 U.S. 965.

(ii) Appellants describe the records they seek as "recommendations to the President." (Representative Mink's Affidavit, Par. 19). Indeed, "they were prepared and used solely for transmittal to the President as advice and recommendations." (Under Secretary Irwin's Affidavit, Par. 5). The power to receive confidential advice regarding a subject of concern, such as proposed nuclear tests, is plainly a part of the power vested in the President by Article II of the Constitution. This brings the documents "within a statutory or constitutional exemption" to 5 U.S.C. 552. *Gary A. Soucie, et al.* v. *David,* — U.S. App. D.C. —, — F.2d — (April 13, 1971) (No. 24,573) (Slip Opinion, page 14).

Furthermore, the "recommendations to the President" appellants seek, including the choice of whatever factors each author considered appropriate to bring to the President's attention, are certainly within 5 U.S.C. 552 (b)(5) since Exemption 5 was enacted as "a clear expression of congressional policy to hold the line on disclosure of materials" "comprising part of a process by which governmental decisions and policies are formulated." *Freeman* v. *Seligson*, 132 U.S. App. D.C. 56, 405 F.2d 1326, 1339 (1968). *Accord: International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349, 1358-1359 (2nd Cir. 1971).[1]

Conclusion

For the foregoing reasons the Motion for Summary Reversal, In Camera Examination, Expedited Consideration, and Oral Argument should be denied.

Respectfully submitted,

/s/ Morton Hollander
MORTON HOLLANDER

/s/ Harland F. Leathers
HARLAND F. LEATHERS

/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Attorneys, Department of Justice
Washington, D.C. 20530

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[1] *In camera* examination is unnecessary for the reasons stated above. *In camera* examination would be especially unwarranted and improper here since the Courts should not normally examine either classified documents, *Epstein* v. *Resor*, 421 F.2d 930, 933 (9th Cir. 1970), cert. denied 398 U.S. 965, or recommendations to the President. See *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 332 (D D.C., 1966), *affirmed per curiam* 128 U.S. App. D.C. 10, 384 F.2d 979, cert. denied 389 U.S. 952.

The opinion and judgment of the court of appeals of October 15, 1971, are printed at Pet. App. A and B.

SUPREME COURT OF THE UNITED STATES

No. 71-909 October Term, 19..

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS,

v.

PATSY T. MINK, ET AL.

ORDER ALLOWING CERTIORARI. Filed March 6, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia. Circuit is granted.

☆ U.S. Government Printing Office: 1972—463-097/660